Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NOVATEL COMPUTER SYSTEMS, INC.
Petitioner,

vs.

CRAY COMMUNICATIONS, INC.
formerly known as
DOWTY COMMUNICATIONS, INCORPORATED
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit has misinterpreted - and, therefore misapplied - this Court's holding in *Celotex* v. *Catrett*, 477 U.S. 317 (1986) ("*Celotex*") by upholding the District Court's shifting the burden of production, under Federal Rule of Civil Procedure 56, from the moving party to the nonmoving party simply upon the moving party's conclusory statement that the nonmoving party does not have the evidence to prove its claim, with no reference to any portion of any pleadings, depositions, answers to interrogatories, admissions on file or any affidavits, which demonstrated the absence of a genuine issue of material fact?

2. Whether the Fourth Circuit improperly abdicated its role of overseeing the trial bench's discretionary powers when it upheld the trial court's: (a) granting summary judgment disposing of Novatel's five million dollar fraud claim against Dowty on a procedural technicality without a hearing, although a hearing had been requested and (b) refusal to permit Novatel to supplement the record with a 25-page affidavit (with 31 exhibits thereto) which established all the elements of Novatel's fraud claim, which was submitted 9 days after the trial court granted summary judgment and which demonstrated that Dowty's assertion that there was no evidence to support Novatel's claim was itself a fraud (on the court)?

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of the United States District Court
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Comes now Petitioner, Novatel Computer Systems, Inc. ('Novatel') and respectfully petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit ('Fourth Circuit') which upheld the granting, by the United States District Court for the District of Maryland ('District Court'), the summary judgment motion filed by Respondent, Cray Communications, Inc.[1], formerly Dowty Communications, Inc. ("Dowty").

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 33 F.3rd 390. A copy of that opinion is reproduced in the Appendix hereto (2a) and the District Court's ORDER and MEMORANDUM OPINION (28a) and ORDER and memorandum,ON RECONSIDERATION, (17a) are contained in the Appendix at the page numbers indicated.

JURISDICTION

The decision sought to be reviewed was issued August 31, 1994. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

---

[1]In accordance with Rule 29.1, on information and belief, Cray Communications, Inc. is a wholly-owned subsidiary of an English corporation the exact identity of which is unknown to Novatel.

RULE OF PROCEDURE INVOLVED

The decision below turned on the interpretation and application of Rule 56 (Summary Judgment) of the Federal Rules of Civil Procedure and its complete text is set forth beginning at page 57a of the Appendix.

STATEMENT OF THE CASE

The fraud claim involved in this case was filed by Notavel in Los Angeles County Superior Court on December 26, 1991. On December 28, Dowty removed the case to the United States District Court for the Central District of California on the basis of diversity jurisdiction (28 U.S.C. § 1332(a)(1). On December 31, Dowty filed a breach of contract claim in the United States District Court for the District of Maryland and, thereafter, moved to transfer the California case to Maryland pursuant to a "choice of forum" provision in the distributorship agreement. This was effected in February, 1992, by stipulation. All further proceedings were in the District Court.

Novatel's claim alleged that Dowty officials had represented that a new Dowty product - to be known as the DCP9506 multiplexer - had all the "features and functions" of its current DCP94000 (which Novatel had tested and successfully deployed), would have identical components except power supply and housing; that components, hardware and software would be compatible and interchangeable; Novatel further alleged that Dowty also represented that the

DCP9506 would be fully certified and beta tested prior to shipping. Novatel alleged that, at the time these representation were made, Dowty knew them to be false; that the DCP9506 was being developed as a different and distinct product, similar but not interchangeable with the DCP9400 and that far from being tested, Dowty was planning to use Novatel for its beta testing; that as a result of Dowty's representations, Novatel took orders for the new system and, upon receipt from Dowty deployed the units in the field to its customers. Novatel further alleged that its customer base came from referrals from the major long distance carriers, AT&T, MCI and US SPRINT. Novatel alleged that the new DCP9506 was incompatible with the previous system and failed at such a high rate that they eventually had to be replaced - at Novatel's expense - with workable multiplexers and that this, plus the damage which this inflicted on Novatel's reputation in the industry, drove Novatel out of business. In its suit against Dowty, Novatel claimed two million dollars compensatory and three million dollars punitive damages. Dowty responded with what amounted to a general denial, in all but a few instances, denying "each and every allegation" contained in the paragraph in question.

Dowty's Summary Judgment Motion[2]

After extensive discovery, Dowty filed a summary judgment motion. The motion was not supported by any affidavits nor did it make any reference to any pleadings, depositions (except the fact that 13 Dowty employees had been deposed), answers to interrogatories (though such had

[2] The actual pleading was a MOTION FOR PARTIAL SUMMARY JUDGMENT and involved other claims. This discussion involves only the fraud claim and is referred to herein as the summary judgment motion.

been filed by Novatel), admissions or documents produced through discovery (except to mention that thousands of documents had been produced). Dowty's motion contained only the bald assertion that Novatel had no evidence to prove its fraud claim and that not one piece of deposition testimony nor one document supported Novatel's fraud claim. Dowty's motion did not contain a statement of undisputed facts and the only legal argument concerned a fraud count in a case involving allegedly defective cement and whether the cement contractor could be shown to have had a pre-contract intention to supply a low quality product[3].

Novatel's Opposition

Faced with such a nebulous challenge (and not having been pointed out any part of the record which Dowty believed demonstrated the absence of a genuine issue of material fact) Novatel, in its opposition, simply referred to the voluminous record on all the factual issues and, by way of example, itemized 8 documents which demonstrated that, far from getting ready to deliver a tested product, Dowty was using Novatel as a beta test site. These were (verbatim as set forth in Novatel's memorandum):

(a) Minutes of May 16, 1991 DOWTY Product Status Meeting reflect that "9506 units are needed for Beta testing before the end of June".

---

[3] Because the crux of this case is the adequacy *vel non* of Dowty's submission on the fraud issue, it is reproduced in the Appendix beginning at A-55.

(b) Memo dated June 8, 1991 from Scott Rey to Gabe Barbaro discussed the " . . . list of equipment that is being ordered for the DCP9506 Beta tests".

(c) Minutes of June 13, 1991 Product Status Meeting where it is stated that, with reference to the 9506, "MCI and NOVATEL are the first two identified beta sites".

(d) Memo from Scott Rey dated August 12, 1991 (a week before DOWTY began shipping to NOVATEL) stating that "the reason that we are releasing the DCP5906 is to gain field experience".

(e) Memo from Tom Wallace to Steve Feldstein dated August 16, 1991 reflecting that NOVATEL will receive the bulk of the 9506 release.

(f) Memo dated August 22, 1991 from Antoinette Strassman to Mike Lindsey (President of DOWTY) reflecting the release of $343,000 of product to NOVATEL.

(g) Minutes of September 12, 1991 Product Status Meeting where it is noted, on page 2, that "The last of six issues from the NOVATEL testing have been resolved. Cards and software has been shipped to NOVATEL for testing"(!).

Novatel also quoted from the deposition of Steve Feldstein (citing page and line numbers), Dowty's vice president in charge of sales, who explained how Novatel could have unkowingly become Dowty's beta test site:

> A. Okay. There are times when we are unable to get customers to beta, or willing to beta. So we limit the release and they are in essence a beta site.
>
> Q. Is that the current plan? That is now being set up here at DOWTY?
>
> A. That is correct.
>
> Q. You either have a willing beta test site or an unwitting (sic) beta test site, is that Right?
>
> A. That is for most part.

When the summary judgment motion was filed by Dowty, a hearing thereon was requested. Novatel concluded its opposition with the statement:

> For the foregoing reasons and further reasons as may be advanced at the hearing hereon, NOVATEL respectfully submits that DOWTY'S MOTION FOR PARTIAL SUMMARY JUDGMENT should be denied.

Further Proceedings

Thereafter, Dowty filed a reply memorandum which attacked the sufficiency of Novatel's opposition but never addressed the adequacy of its own motion. The Rules allow for only a motion, an opposition and a response. Therefore, Novatel had to await the hearing to explain that Dowty's 'production' in its summary judgment motion was totally inadequate to trigger the provisions of Rule 56(e) which require more than a reliance on pleadings "(w)hen a motion for summary judgment is made **and supported as provided in this rule**." (emphasis added). Both at the trial level and the appellate level, the meaning of the bolded words was pivotal as it will be if this Court grants this Petition. Novatel waited in vain for a hearing.

On October 16, 1994, the District Court issued its ORDER and MEMORANDUM OPINION (28a) granting Dowty's summary judgment motion. basically on the grounds that Novatel had run afoul of the above-mentioned provision. Nine days later, Novatel filed a MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, PERMIT THE RECORD TO BE SUPPLEMENTED. The motion asked the trial to reconsider its opinion in light of the case law requiring a party moving for summary to support its motion "as provided in this rule", i.e. by specific references to the record and/or affidavits. As alternative relief, the motion asked the trial court to permit the record to be supplemented and proffered the affidavit of Novatel's President and CEO, Daniel Pearlson which detailed Novatel's claim by his direct testimony, references to the deposition testimony of Dowty employees and to documents which were attached to the affidavit as exhibits (31 in all). The Affidavit supported each allegation of fraud not by self-serving statements of Mr.

Pearlson but by reference to Dowty's own records and the testimony of persons in the employ of Dowty.

On November 9, 1992, the District Court issued its ORDER and memorandum, ON RECONSIDERATION (17a), which denied Novatel's two-pronged motion. Faced with considering the adequacy of the moving party's submission, the District Court took what can only be characterized as a tortuous path to arrive at the position that a moving party need only "point out" that the nonmoving party has no evidence to support its claim in order to require the nonmoving party come forth with its evidence.

REASONS FOR GRANTING THE WRIT

The primary reason for this Court to review the decision of the Fourth Circuit is to bring uniformity among the circuits and, undoubtedly, among district courts within the same circuit. At the present time, there appears to be a substantial diversity of opinion in various federal courts as to what the burden of the moving party is, when the summary judgment motion is predicated on the claimant's lack of proof as to factual issues which the nonmovant bears the burden of proof at trial.

In most circuits, the traditional approach - requiring the movant to support his motion by affidavit(s) or direct reference to the record - is followed. This approach is illustrated in the case of *Missouri Pacific Railroad Company* v. *Harbison-Fischer Manufacturing Company*, 26 F.3rd 531 (5th Cir. 1994) where the court reversed the granting of summary judgment on the basis that:

> "The movant has the initial burden of demonstrating the absence of material fact issues. Harbison-Fischer failed to meet that burden. Its motion neither delineates the precise elements of MOPAC's environmental remediation claim nor attempts to demonstrate how no genuine issue of fact exists as to any of them."
>
> *Id.* at 26 F.3rd 539

On the other hand, the Seventh Circuit seems to have taken the same position that the Fourth Circuit did in this case, requiring only a conclusory assertion by the moving party. In *Walker* v. *Shansky*, 28 F.3rd 666 (7th Cir. 1994), the Court stated, at 28 F.3rd 670:

> "Once a party has moved for summary judgment, the burden shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues the nonmovant bears the burden of proof at trial."

To the same effect is *Buscaglia* v. *U.S.*, 25 F.3rd 530 (7th Cir. 1994). Such opinions are troubling. They are 180 degrees from this Court's holding in *Adickes* and go way beyond the holding in *Celotex*. Cases such as these demonstrate the need to spell out definitively what is required of a party moving for summary judgment.

The issue of what is required of the moving party is not specifically addressed in most reported cases because the moving party has supported its motion with affidavits, as in *Lewis* v. *Gillette Co.*, 22 F.3rd 22 (1st Cir. 1994) where the

movant filed three affidavits denying discrimination or with direct references to matters of record, as in *Baptiste* v. *C.I.R.*, 29 F.3rd 1533 (11th Cir. 1994) where the movant referred to an admission by Baptiste in support of his motion.

It appears that many district courts have dealt with this issue through the adoption of local rules requiring the moving party to accompany a motion for summary judgment with a "Statement of Genuine Issues". See *Professional Programs Group* v. *Department of Commerce*, 29 F.3rd 1349 (9th Cir. 1994). However, it is respectfully suggested that this is an issue that should not be dealt with haphazardly through local rules. There should be uniformity throughout the federal system. At this point, only this Honorable Court can bring such uniformity.

In its opinion below, the Fourth Circuit relies on *Celotex* to affirm the District Court's holding and refers to *Celotex* as 'the Supreme Court's seminal summary judgment decision" (at 33 F. 3rd 393). Actually that title would more aptly apply to this Court's decision in the case of *Adickes* v. *Kress*, 238 U.S. 4566 (1977). Until *Celotex*, *Adickes* was the preeminent and controlling case on what was required of a party moving for summary judgment. *Adickes* was a public accommodations discrimination suit where the store, in moving for summary judgment, had failed to file an affidavit or other proof that negated the Plaintiff's claim that a police officer was in the store and (inferentially) participated in the alleged discrimination. Justice White, concurring with the majority, emphasized:

> " . . . both the commentary on and background of the 1963 amendment conclusively show that it was not intended to

> modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact. The Advisory Committee note on the amendment states that the changes were not designed to 'affect the ordinary standards applicable to the summary judgment.' And, in a comment directed specifically to a contention like respondent's, the Committee stated that '[w}here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.' Because respondent did not meets its initial burden of establishing the absence of a policeman in the store, petitioner here was not required to come forward with suitable opposing affidavits." *Id.* at 398 U.S. 157.

Adickes has never been overruled by this Court, *sub silentio* or otherwise. On the contrary, in *Celotex*, this Court expressly stated (at 477 U.S. 325) that: "on the basis of the showing before the Court in *Adickes*, the motion for summary judgment should have been denied".

Celotex was a products liability case where the summary judgment motion of the manufacturer asserted that the plaintiff could not prove that her late husband had been exposed to asbestos manufactured by the Defendant. This Court reversed the D.C. Circuit Court of Appeals reversal of the granting of summary judgment on the basis that such a challenge was sufficient. It could be said that *Celotex* refined the holding of *Adickes* to accommodate situations where it

would be impossible for the moving party to negate an essential element of the nonmoving party's claim. *Celotex* never retreated from the position that where the moving party has the ability to negate or contradict the allegations of the Plaintiff, it must do so by affidavit or reference to deposition testimony, admissions or other matters of record.

As Justice White, in his concurring opinion in *Celotex*, states:

> " . . . the movant may rely on depositions, answers to interrogatories, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him; it is not enough to move for summary judgment without supporting the motion in any way or with a conclusory statement that the plaintiff has no evidence to prove his case". *Id.* at 477 U.S. 328.

It is possible, but difficult, to reconcile the two cases and impossible to reconcile *Adickes* with the host of cases spawned by *Celotex*., which, take the view that:

> "Rule 56 first imposes a burden of production on the moving party to make a *prima facie* showing that it is entitled to summary judgment. In a case in which the nonmoving party bears the ultimate burden of persuasion at trial . . . the movant might satisfy its burden shifting obligation by either:

> (1) submitting evidentiary documents that negate the existence of some material element of the opponent's claim or defense; or (2) demonstrating that the evidence in the record insufficiently supports an essential element of the opponent's claim or defense. If (and only if) the movant satisfies this *prima facie* obligation, the movant will have sufficiently 'shifted' the summary judgment burden to the *nonmovant* - to demonstrate that summary judgment is actually inappropriate."
>
> *Willis* v. *Roche Biochemical Laboratories, Inc.*, 21 F.3rd 1368 (5th Cir. 1994) at 1371.

Certiorari should be granted and this Court should construe the pertinent language of Rule 56 so as to create certainty for the bench and bar and uniformity among and within the circuits. The instant case is the product of the uncertainty generated by *Celotex*. In his dissent in that case, Justice Brennan (joined by the Chief Justice and Justice Blackmun, complained:

> " . . . the (Supreme) Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion." *Id.* at 477 U.S. 329.

Guidance from this Court is sorely needed. The burden on the nonmoving party in a summary judgment situation is well settled. What is required of the moving party is nowhere spelled out with sufficient detail to be of assistance to the bench and bar. This case gives this Court the opportunity to do so and, in the process, greatly reduce the amount of appellate litigation on this issue.

Celotex clearly states that the moving party need not negate all aspects of the plaintiff's claim. Read most narrowly, *Celotex* carves a very small refinement in the *Adickes* standard, namely, that the moving party need not negate any factual issue as to which the nonmoving party bears the burden of persuasion at trial and as to which the moving party could not be expected to have evidence of. This was the case in *Celotex* where only the Plaintiff would have had evidence of exposure to Defendant's asbestos, if there was any.

A broader view of *Celotex* - and the view which Novatel would urge on this Court - is that the moving party must negate any factual matters that are within its realm of knowledge. As an example, if a trucking company is sued on the basis of *respondent superior* and wishes to raise the defense that the truck in question was not owned, nor was its driver employed, by it, in the context of a summary judgment motion, the trucking company should be required to affirmatively present to the court, by affidavit or otherwise, evidence to that effect. The trucking company should not be allowed to file a motion for summary judgment which just asserts; 'Plaintiff cannot prove that Defendant owned the truck or that the driver was employed by Defendant."

Yet, that is precisely what happened in this case. Dowty's motion simply says (twice) that Novatel could offer no evidence that Dowty made any representations "which it knew to be false at the time such representations were made." In support of Dowty's summary judgment, there are no affidavits or other evidence to show that the representations alleged were not made, or that, though made, they were true, or believed to be true, or that the DCP9506 was the functional equivalent of the DCP 9400, or that it was not and Novatel knew this, that the product had been fully certified and tested or that it was not and Novatel willingly agreed to be a beta test site. All of these factual contentions - particularly those concerning what representations were made and what Dowty's knowledge and/or intentions were at the time - are matters peculiarly within the knowledge of Dowty. That no sworn affidavits from Dowty employees or officers addressed these issues says a great deal about the *fides* of Dowty's motion. It suggests that Dowty could find no one willing to subject himself to the penalties of perjury by signing an affidavit controverting Novatel's factual assertions.

In this case, the Fourth Circuit (by upholding the District Court) took Rule 56 to an extreme that - Novatel respectfully suggests - was never intended by this Court. It puts no burden on the moving party and puts all the burden on the nonmoving party. Or, as Justice Brennan observed in his dissent in *Celotex*, at 477 U.S. 332:

> "Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a 'burden' is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, a party who moves

> for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record." (emphasis added)

A second reason to review the holding in this case is the most difficult to articulate yet, in the scheme of things, is the more important. This case affords the opportunity for this Court to exert its moral authority as the highest court in the land to bring back the philosophy that the Law is a search for the truth and an effort to do substantial justice - through decisions on the merits - and reverse a trend of cases being decided on hypertechnical procedural grounds - that are punitive in effect - where technicality triumphs over substance. Novatel pointed out that this was the goal of the Federal Rules and their application by the courts. The Rules are meant to be a shield, to protect litigants from unjustice rather than a sword to impale the unwary.

As Professor (at Duke University Law School) Paul Carrigan states in his article 'Learning from the Rule 26 Brouhah" (published at 156 F.R.D. 295) the reasons why Congress delegated the process of rule making to this Court in the Rules Enabling Act of 1934:

> " . . . was to elevate the status of the law and the legal profession by making a procedural system more adept at getting to the merits of disputes and less vulnerable to gamesmanship rewarding arcane skills of crafty pleaders."

The most disturbing aspect of this case - which Novatel brought to the Fourth Circuit's attention (but the Fourth Circuit did not address) - is that when the District

Court denied Novatel's reconsideration motion, the court knew - by virtue of Daniel Pearlson's Affidavit - that the initial contention that Novatel had no evidence to prove its case, was false. Even if one accepts the concept of "pointing out" as a means of shifting the burden, how could the District Court rely on that concept in the face of incontrovertible proof that the record was replete with evidence to support Novatel's case? Granted, that deference must be given to the discretionary powers of trial court. But there must be a limit.

Novatel is aware that this Court, in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990) reversed the D.C. Court of Appeals' holding that the trial court's refusal to receive untimely affidavits was an abuse of discretion, but is cognizant of the fact that four Justices of this Court felt that it was. So Novatel does not feel that the issue of abuse of discretion in the context of this case is foreclosed.

If certiorari is granted in this case, Novatel will be asking this Court to send a clear message to the lower federal (and state) courts that the highest priority of the court system is for litigants to attain justice; not for the courts to clear their dockets at the expense of justice.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT COURT

FILED
September 21, 1994

No. 93-2413
CA-91-3734

Cray Communications v. Novatel Computer Systems

MANDATE

The judgment of this Court dated 8/31/94 takes effect today.

BERT M. MONTAGUE
CLERK

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT COURT

CRAY COMMUNICATIONS, INC.,
formerly known as Dowty
Communications, Incorporated
Plaintiff-Appellee, **No. 93-2413**

v.

NOVATEL COMPUTER SYSTEMS, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
John R. Hargrove, Senior District Judge
(CA-91-3734)

Argued: May 12, 1994

Decided: August 31, 1994

Before MURNAGHAN and NIEMEYER, Circuit Judges, and ERWIN, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Murnaghan wrote opinion, in which Judge Niemeyer and Senior Judge Erwin joined.

COUNSEL

ARGUED: William Norman Rogers, Rockville, Maryland, for Appellant. Eric Allan Deutsch, TESTA, HURWITZ & THIBEAULT, Boston, Massachusetts, for Appellee. **ON BRIEF:** Thomas M. Goss, GOODELL, DEVRIES, LEECH & GRAY, Baltimore, Maryland, for Appellee.

OPINION

MURNAGHAN, Circuit Judge:

Appelle, Dowty Communications, Inc. ("DOWTY"), now known as Cray Communications, Inc., brought a diversity action, sounding in contract, against appellant Novatel Computer Systems, Inc. ("NOVATEL"). Novatel counterclaimed, alleging fraud and breach of contract. Dowty moved for partial summary judgment on Novatel's counterclaims. The district court granted Dowty's motion, dismissed Novatel's fraud counterclaim for lack of evidentiary support, and limited any potential recovery on Novatel's contract counterclaim to those remedies expressly provided for in the parties' contract. Novatel moved for permission to supplement the record and for reconsideration. The district court denied Novatel's motion, and Novatel appealed.

I

Dowty, designs, manufactures, sells, and supports telecommunications equipment. Novatel, among other things, sold communications equipment to "end users. Dowty and Novatel entered into a Master Distributor Agreement ("the Agreement"), under which Novatel became

a non-exclusive distributor of a Dowty product known as the "Series DCP9506 T-1 network access multiplexers." Novatel intended to purchase the multiplexers from Dowty and then distribute them to end users under the Novatel logo and name.

In the Agreement, Dowty warranted that its products and repair work would be free from defects in material and workmanship for a specified period of time. Dowty made no other warranties, expressed or implied. Novatel and Dowty also agreed to limit Dowty's liability: the Agreement expressly restricted Novatel's remedies to the repair or replacement of defective products or to a refund of the purchase price (or of the cost of repair). The Agreement also precluded Novatel from recovering consequential, incidental, special, or punitive damages.

Pursuant to the Agreement, Dowty shipped multiplexers to Novatel, submitted invoices to Novatel, and repeatedly demanded payment from Novatel. Novatel refused to pay, and alleged that Dowty was late in shipping the units and that the units Dowty did ship did not function as promised. Dowty has denied those allegations.

Dowty filed the instant diversity action in the he United States District Court for the District of Maryland for recovery of monies due on account and for breach of contract.[1] Dowty sought actual damages of $434,247. Novatel filed an answer denying liability and asserted counterclaims for fraud and breach of contract, seeking $2,000,000 in actual damages and $3,000,000 in punitive and exemplary damages.[2] The parties engaged in extensive

---

[1]Dowty also alleged causes of action for breach of the implied covenant of good faith and fair dealing and for quantum meruit. Those claims were subsequently dismissed voluntarily.

[2]Novatel also raised counterclaims for breach of the implied covenant of good faith and fair dealing and for intentional interference with

discovery, including the production of more than 100,000 documents and the taking of seventeen depositions comprising twenty-seven volumes of testimony.

On July 27, 1992, Dowty filed a motion for partial summary judgment and a supporting memorandum, along with a request for a hearing. Attached to the memorandum was an affidavit from Dowty's local attorney and several exhibits, most of which were not properly authenticated. Dowty's motion sought an order granting summary judgment in its favor on Novatel's claims insofar as those claims sought relief other than the remedies expressly provided for in the parties' Agreement, namely, repair or replacement of the multiplexer products or a refund of their purchase price. Dowty's memorandum in support of its motion also alleged that Novatel lacked sufficient evidence to establish essential elements of its fraud claim. Therefore, Dowty requested partial summary judgment as to Novatel's contract claim and full summary judgment as to the fraud claim.

Novatel requested and obtained several extensions to respond to Dowty's summary judgment motion. On September 18, more than seven weeks after Dowty's motion had been filed, Novatel filed its memorandum in opposition. Novatel attached no affidavits, deposition excerpts, answers to interrogatories, admissions on file, or authenticated documents. Only an unauthenticated eleven-page chart, which was entitled "DCP9500 Systems Failure Analysis" and which was apparently generated during the course of the litigation, was attached to Novatel's memorandum. The memorandum neither challenged the admissibility of the evidentiary materials that Dowty had attached to its motion

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Footnote 2 continued from previous page-
prospective business advantage. It subsequently abandoned those claims.

nor argued that Dowty had failed to shift the burden of production to Novatel. Rather, it attempted to address Dowty's motion on the merits.

On September 29, 1992, Dowty submitted a reply memorandum in which it argued that Novatel had failed to meet its burden of production under Rule 56 of the Federal Rules of Civil Procedure. Novatel did not submit any further briefing or evidence in opposition to Dowty's summary judgment motion, nor did it seek leave to do so.

On October 19, 1992, without holding a hearing, the district court filed a memorandum opinion and order granting Dowty's motion for partial summary judgment. *Dowty Communications, Inc. v. Novatel Computer Sys. Corp.*, 817 F. Supp. 581, 582-92 (D. Md. 1992). Novatel filed a motion to reconsider and to permit Novatel to supplement the record with an accompanying affidavit of Daniel D. Pearlson, Novatel's president and chief executive officer. The district court denied Novatel's motion. *Id.* at 592-96. Subsequently, the court entered final judgment disposing of all claims in the case. Novatel filed a timely notice of appeal.

II

In its fraud claim, Novatel alleged that Dowty had fraudulently induced it to purchase equipment by making several misrepresentations.[3] Novatel claimed that (1) Dowty knew that those representations were false when it made

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[3]While negotiating with Novatel, Dowty allegedly represented that (1) the DCP9506 product had all the same features and functions as the more expensive multiplexer that Dowty had initially, and unsuccessfully, marked to Novatel (the DCP9400); (2) the DCP9506 and the DCP9400 used compatible components, software, and hardware (3) the DCP9506 product was functional; and (4) Dowty had already begun "beta testing" the product (*i.e.*, testing the product at a customer location rather than in a laboratory).

them; (2) Dowty continued to make such false representations in order to secure Novatel's order; (3) Novatel would not have entered into the Agreement if Dowty had not made the misrepresentations; and (4) as a direct result, Novatel was "ruined."

Dowty moved for summary judgment, asserting that Novatel could produce *no* evidence (let alone the requisite "clear and convincing evidence") to establish the essential element of intent to defraud. Dowty's memorandum in support of the motion challenged Novatel to "come forward with specific evidence that shows that, at the time any of the alleged representations [about the quality or characteristics of its products] were made, Dowty did not intend to produce equipment conforming to those representations." In response, Novatel failed to produce any such evidence, and also failed to present any argument that it was not required to do so. No surprisingly, Dowty's reply memorandum highlighted those failures.

The district court dismissed Novatel's fraudulent-misrepresentation claim on the ground that it was not supported by sufficient evidence to create a genuine issued of material fact. *See* 817 F. Supp. at 590-92. The court concluded that Novatel had:

> neither produced nor alluded to any factual support for its allegations concerning the representations supposedly made by Dowty. While it would not have been difficult for Novatel to attach an affidavit or deposition of its President outlining his version of the contractual negotiations, this Court, in the absence of such a minimal showing, will not attempt to infer what representations, if any, were actually made.

Id. at 591.

On its motion for reconsideration and again on appeal, Novatel has claimed that the district court misunderstood, and therefore misapplied, the Supreme Court's seminal summary judgment decision in *Celotex Corp. v. Catrett*, U.S. 317 (1986). Specifically, Novatel has argued that Dowty was required to support its summary judgment motion with evidence tending to *negate* Novatel's fraud claim; when Dowty failed to submit such evidence, Novatel was excused from its burden of producing any contrary evidence.[4]

Novatel has gotten the holding of *Celotex* precisely backwards. Indeed, Novatel's understanding of the Rule 56 standard for summary judgment is virtually indistinguishable from that of the D.C. Circuit in *Celotex* --- which the Supreme Court squarely rejected. *See Celotex*, 477 U.S. at 319-28, *rev'g Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184-85 (D.C. Cir. 1985).

In *Celotex* the district court had entered summary judgment for the defendant. The D.C. Circuit reversed because the defendant had failed to support its motion for summary judgment with evidence tending to negate the plaintiff's claim. The Supreme Court reversed, upholding the district court's entry of summary judgment:

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[4]The district court described Novatel's theory as follows:

> Novatel asserts...that it had no obligation to submit admissable factual evidence in support of its counterclaims and in opposition to Dowty's [summary judgment] motion because Dowty had not properly supported its motion with evidence. Novatel's syllogism concludes that because Dowty never shifted the burden of production to Novatel, Novatel's failure to comply with the procedural requirements of Rule 56(e) cannot provide a justification for summary judgment against it.

817 F. Supp. at 592.

> Under the Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such situation, there can be "no genuine issue as to any material fact", since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. at 322-23.

As a leading treatiese on federal procedure explains, under *Celotex*, "the moving party on a summary judgment motion need not produce evidence, but simply can argue than there is an absence of evidence by which the nonmovant can prove his case." 10A Charles Alan Wright, Alan R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2720, at 10 (2d ed. Supp. 1994); *see Celotex*, 477 U.S. at 325 ("[T]he burden on the moving party can be discharged by 'showing' --- that is, pointing out to the district court --- that there is an absence of evidence to support the nonmoving party's case.").

The Supreme Court has recently reiterated the point:

> *Celotex* made clear that Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case; to the contrary, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 46(c), is satisfied."

Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990) (quoting *Celotex* 477 U.S. at 323); *see Edwards v. Aguillard*, 482 U.S. 578, 595 n.16 (1987) ("There is 'no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.'" (quoting *Celotex*, 477 U.S. at 3223); *see also Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 216 (4th Cir. 1987).

The district court here applied *Celotex* properly. Dowty's opening memorandum in support of its summary judgment motion stated that "Novatel can offer no evidence that before entering into the Agreement, Dowty made any representations which it knew to be false at the time that such alleged representations were made." Dowty's memorandum went on to state that "Novatel deposed no less than thirteen Dowty employees and Dowty produced thousands of pages of documents, yet not one piece of Dowty deposition testimony nor one single Dowty document supports Novatel's fraud claim." Those statements alone sufficed to support Dowty's motion for summary judgment and to shift the

burden of production to Novatel. *See* Fed. R. Civ. P. 56(e),[5] *Celotex*, 477 U.S. at 324.

In its opposition, Novatel made no effort to call the court's attention to evidence in the record that Dowty had overlooked. It placed before the district court not a single affidavit, deposition, answer to an interrogatory, or admission on file. Novatel's legal memorandum devoted fewer than three pages to the fraud claim and did not refer the district court to any competent record evidence. Thus, Novatel failed to satisfy its burden of production under Rule 56, as interpreted in *Celotex* and its progeny.

The posture of the case at the time of summary judgment made Novatel's complete failure of proof particularly unsatisfactory; as Novatel has itself admitted, when the summary judgment motion was made, extensive discovery had already resulted in the production of more than 100,000 documents and the taking of seventeen depositions (thirteen from Dowty employees), which filled twenty-seven volumes. Novatel did not request a continuance to take additional depositions, to obtain affidavits, or to have any further discovery. *See* Fed. R. Civ. P. 56(f). Novatel was not "in any sense 'railroaded' by a premature motion for summary judgment." *Celotex*, 477 U.S. at 326. It had a full and fair opportunity to discover relevant evidentiary material and to

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[5]Rule 56(e) provides, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

present that material to the court. Novatel simply failed to seize the opportunity. Therefore, we agree with the district court's conclusion that Novatel "failed to submit, in accordance with Fed. R. Civ. P. 56, factual support for each element" of its fraud claim, and that Dowty was entitled to summary judgment. 817 F. Supp. at 591.

III

Novatel, however, has sought a second bite at the apple: after the district court entered summary judgment in favor of Dowty, Novatel moved for permission to supplement the record and for reconsideration. The district court denied the motion. We review the district court's ruling for an abuse of discretion. *See Orsi v. Kirwood,* 999 F.2d 86, 91 (4th Cir. 1993); *International Longshoremen's Ass'n. v. Cataneo Inc.,* 990 F.2d 792, 800 (4th Cir. 1993); *RGI, Inc. v Unified Indus., Inc.,* 963 F.2d 658, 662 (4th Cir. 1992); *Boryan v. United States,* 884 F.2d 76, 771 (4th Cir. 1989).

Novatel sought to supplement the record with an affidavit of Daniel D. Pearlson, Novatel's president and chief executive officer, and thirty-one exhibits attached thereto. Novatel did not claim that the affidavit or exhibits were "newly discovered evidence" or had otherwise been "unavailable" prior to the entry of summary judgment. Instead, Novatel's memorandum explained that its lawyer had thought it "unnecessary" to attach the affidavit and exhibits to the original opposition memorandum, and argued that Novatel should not be prejudiced by the advice of its attorney.

We reject Novatel's argument, for the same reasons that we rejected a virtually identical argument by the plaintiff-appellant in *RGI, Inc.,* 963 F.2d at 660-62. In *RGI, Inc.,* the defendants made and properly supported a motion for summary judgment. RGI opposed the motion with a single

affidavit. The district court held that RGI's affidavit was merely conclusory and was therefore insufficient to raise a genuine issue of material fact. Accordingly, the court granted summary judgment to the defendants. RGI moved for reconsideration and, in an effort to set forth specific facts showing that there was a genuine issue for trial, attached to its motion a "supplemental" affidavit of its president. The district court refused even to consider the supplemental affidavit, on the ground that RGI had failed to provide a legitimate justification for not presenting it earlier, during the summary judgment proceedings. The court denied the motion for reconsideration, and RGI appealed. *See id.*

On appeal, RGI argued that it had "misunderstood" the burden of production that had been placed on it by the defendant's motion for summary judgment. Notwithstanding that argument, we affirmed the district court's judgment. In doing so, we explained that a district court, in its discretion, could accept new evendtiary material that was attached to a party's reconsideration motion *if* the party could justify its failure to submit the material prior to the entry of summary judgment. The mere fact that the party "misunderstood" its burden of production under Rule 56, however, was not a legitimate justification. Absent such a justification, the district court could, within its discretion, completely ignore the new evidentiary material. *See id.* at 662.

Novatel attempts to justify the late submission of its president's affidavit by referring to its *lawyer's* mistaken understanding of Rule 56, as interpreted in *Celotex* and its progeny. Novatel contends, in essence, that dismissal of its fraud claim because of its counsel's mistake imposes an unjust penalty on the client. As Justice Harlan once explained, such contentions are "wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of [its lawyer]." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962); *see also id.* at 634 n.10 ("[K]eeping

this suit alive merely because plaintiff should not be penalized by for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the *defendant*."). Novatel has provided no legitimate justification for failing to present the Pearlson affidavit and exhibits during summary judgment proceedings. Therefore, the district court was well within its discretion in refusing to consider those materials.

Furthermore, as the court noted in its opinion, Novatel's memorandum in support of its motion for reconsideration did "not direct the Court to specific factual evidence (in the Pearlson affidavit or exhibits) tending to create a genuine dispute over a material fact." 817 F.Supp. at 595 n.3. By failing to cite any specific, relevant facts in the supplemental evidentiary materials. Novatel effectively left to the district judge the unenviable task of poring over the 25 pages of affidavit and the 117 pages of each attached exhibits in search of bits of evidence that could preclude summary judgment. Even assuming *arguendo* that the district court had some duty to consider the affidavit and exhibits, it would have remained well within its discretion in refusing to ferret out the facts that counsel had not bothered to excavate. Therefore, we affirm the district court's denial of Novatel's motion for permission to supplement the record and for reconsideration.

IV

Novatel also has argued that the district court should not have granted summary judgment without giving it an opportunity to respond to the argument in Dowty's reply memorandum concerning the burdens of production under Rule 56. Specifically, Novatel has asserted that the district court should have either requested further briefing from Novatel or held a hearing. The district court's actions here are reviewable only for an abuse of discretion. *See Coakley*

& Williams Construction., Inc. v. Structural Concrete Equip., Inc. 973 F.2d 349, 352 (4th Cir. 1992).

There is no absolute requirement that a ruling on a motion for summary judgment be preceded by a hearing. *Sakaria v. Trans World Airlines,* 8 F.3d 164, 169 (4th Cir. 1993), *cert. denied,* 114 S. Ct. 1835 (1994); *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.,* 813 F.2d 1327, 1330 (4th Cir.), *cert. denied,* 484 U.S. 829 (1987). Local Rule 105.6 of the United States District Court for the District of Maryland specifically provides: "Counsel may (but need not file) a request for hearing. Unless otherwise ordered by the Court, however, all motions shall be decided on the memoranda *without a hearing.*" Loc. R. 105.6, U.S. Dist. Ct. for the Dist. of Md. (emphasis added). Following the submission of Dowty's reply memorandum in support of its summary judgment motion, Novatel did not seek leave to submit any further briefing or opposition in motion. Therefore, the district court clearly did not abuse its discretion in deciding in Dowty's summary judgment motion on the basis of the papers before it.

Finally, Novatel has argued that the district court erred in granting partial summary judgment as to its claim for breach of contract. The court limited any potential recovery on that claim "to the warranties and promises made with the four corners" of the Agreement, *i.e.,* "to the cost of repairing or replacing the multiplexers, or to a refund of the purchase price." 817 F. Supp. at 592. For the reasons set forth in the district court's opinion, *see id.* at 585-589, we affirm the ruling on Novatel's contract claim.[6]

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[6]Novatel's opening brief on appeal barely attempted to critique the district court's reasoning with regard to the contract claim. Indeed, throughout its briefs, the appellant repeatedly failed to engage the opinion of the district court. The failure stems at least in part from Novatel's use of a practice that has been consistently and roundly

VI

Accordingly, the judgment of the district court is

AFFIRMED.

Footnote 6 continued from previous page -
condemned by the Courts of Appeals: the appellant's briefs merely adopted by reference the memoranda that it had previously filed in the district court. *See* 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §3974, at 733 & 742 n.27.7 (2d ed. Supp. 1994) (collecting cases criticizing the practice); *Avol v. Secretary of Health and Human Servs.*, 883 F.2d 659, 661 (9th Cir. 1989) (levying a $500 sanction against an appellant's attorney whose principal brief repeatedly referred the Court of Appeals to a lengthy memorandum of points and authorities that had been filed in the district court); *United States v. Bales*, 813 F.2d 1289, 1297 (4th Cir. 1987) (noting that the Courts of Appeals "have stated that arguments incorporated by reference need not be considered on appeal"); *Prudential Ins. Co. v. Sipula*, 776 F.2d 157, 161 n.1 (7th Cir. 1985) (The practice of adopting the memoranda filed in the district court and incorporating them by reference in the appellate brief "is ill-advised from the point of view of effective advocacy, as it unnecessarily confuses and diffuses the issues presented. The posture and focus of [the] case has changed substantially on appeal and many of the arguments made below are now irrelevant.").

Dowty has urged us to hold that Novatel's "incorporation-by-reference technique violates Rule 28(a)(5) of the Federal Rules of Appellate Procedure and thus constitutes a waiver of the arguments advanced by Novatel. Because the arguments that Novatel presented to the district court and later incorporated by reference into its appellate brief lacks merit, we need not address the question of whether those arguments were improperly presented in the appellant's briefs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOWTY COMMUNICATIONS INCORPORATED Plaintiff	*	
v.	*	Civil Action No. HAR 91-3734
NOVATEL COMPUTER SYSTEMS CORPORATION Defendant	*	

ORDER

This ninth (9th) day of November, 1992, it is, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendant Novatel's Motion to Reconsider or, in the alternative, to Permit the Record to be Supplemented BE, and the same hereby IS, DENIED.

2 That the Clerk of the Court MAIL copies of this Order and the attached Memorandum Opinion to all parties of record.

/s/ John R. Hargrove
John R. Hargrove
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOWTY COMMUNICATIONS INCORPORATED Plaintiff	:	
v.	:	Civil Action No. HAR 91-3734
NOVATEL COMPUTER SYSTEMS CORPORATION Defendant	:	

ON RECONSIDERATION

In response to the Court's October 16, 1992 decision restricting its breach of contract counterclaim and dismissing its fraudulent misrepresentation counterclaim, Novatel urges the Court to reconsider its Order granting partial summary judgment, or in the alternative, to permit Novatel to supplement the record. The crux of its claim that the Court should reconsider its holding rests with Novatel's argument that the Court misapplied the appropriate burdens of production when it first evaluated Dowty's Motion for Partial Summary Judgment. Novatel asserts, for the first time in its Motion to Reconsider, that it had no obligation to submit admissible factual evidence in support of its counterclaims and in opposition to Dowty's motion because Dowty had not been properly supported its motion with evidence. Novatel's syllogism concludes that because Dowty never shifted the burden of production to Novatel, Novatel's failure to comply with the procedural requirements of Rule 56(e) cannot provide a justification for summary judgment against it.

The Court notes at the outset that Novatel raised no challenge of the sufficiency of Dowty's Motion for Partial Summary Judgment in its initial Opposition. Instead, after discussing the standards for summary judgment, the reluctance of some courts to grant summary judgment in cases wherein particular states of mind are decisive as elements of a claim, and its unverified version of the factual background, Novatel dedicated seven pages of its Memorandum in Opposition to discuss how caselaw has applied the UCC to contractual provisions limiting claims for relief and available remedies. Novatel then devoted the remainder of its Opposition to a discussion of the elements of fraud, making the conclusory assertion that Dowty's conduct and Novatel's reliance thereon, satisfied said elements. It is clear to the Court that Novatel understood the legal arguments put forth by Dowty in its Motion for Partial Summary Judgment and attempted to confront those arguments directly. Most assuredly, Novatel did not assert in its Opposition that Dowty's positions with respect to the contractual limitations on remedies and the absence of evidence supporting the counterclaim of fraudulent misrepresentation were undeserving of response because they themselves were unsupported factually.[1]

Even were the Court to overlook Novatel's failure to timely raise its objections to the alleged absence of factual support for Dowty's Motion for Partial Summary Judgment, it is difficult to fathom what additional factual support Novatel would have Dowty present to support its argument that the clear, unambiguous terms of the MDA restricted both

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[1] Novatel argues on page 12 of its instant motion the 'Dowty's submission is so insufficient that Novatel could -- and considering what happened, probably could -- have ignored it entirely. Novatel's counsel, however, chose to respond, mainly because the Limitation of Damages issue appeared to be one that might be susceptible to being decided as a matter of law."

claims and remedies for breach of contract. Dowty, in addition to offering the contract itself, presented testimony that Novatel used similar language in its own contracts to restrict warranties and limit remedies; it presented deposition testimony that Novatel's President and CEO understood the contract's terms; and it presented deposition testimony that Novatel refused to return defective multiplexers so as to allow Dowty the opportunity to repair or replace them. This evidence was sufficient, in light of Novatel's complete failure to present evidence to the contrary, to support partial summary judgment for Dowty on Novatel's breach of warranty counterclaim.

With respect to Dowty's Motion for Partial Summary Judgment, although it does not so identify, is the precise dilemma that the Supreme Court wrestled with in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), namely the procedural mechanics of Rule 56 and the respective production burdens for moving and nonmoving parties. While the Celotex majority opinion is often cited for its articulation of the appropriate burden of persuasion during summary judgment,[2] a secondary debate over how the respective parties approach the burden of production manifests itself in the majority opinion, Justice White's concurring opinion, and Justice Brennan's dissenting opinion.

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[2] "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. at 322-23.

On page 19 of its Memorandum in Support of Partial Summary Judgment, Dowty simply asserted that 'Novatel can offer no evidence that before entering into the Agreement, Dowty made representations it knew to be false at the time such alleged representations were made. Also, Novatel cannot show that any reliance upon such alleged representations by Dowty caused damage to Novatel." Similarly, Dowty claimed on page 21 of its Memorandum that:

> Novatel cannot offer specific evidence on which a fact finder could reasonably conclude that Dowty made representations about the quality or characteristics of its products which it knew to be false at the time such representations were made . . . Indeed, Novatel deposed no less than thirteen Dowty employees and Dowty produced thousands of pages of documents, yet not one single Dowty document supports Novatel's fraud claim.

Like Dowty's Motion for Partial Summary Judgment on Novatel's fraud counterclaim, the defendant in Celotex, an asbestos exposure wrongful death case, argued in its motion for summary judgment that the plaintiff had no evidence tending to show the decedent's exposure to the particular defendant's products. In discussing how a moving party should approach judgment on the ground that the nonmoving party lacks the evidence to prove its case, the majority noted that:

> a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it

> believes demonstrate the absence of a genuine issue of material fact."

Celotex, supra 477 U.S. at 323. (emphasis added). The majority went on to say:

> We do not think Adickes . . . should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing" -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case.

Celotex, id. at 325. (emphasis added).

Novatel's instant Motion to Reconsider presents the question whether Dowty adequately and properly informed the Court that it believed there was an absence of evidence to support Novatel's fraudulent misrepresentation counterclaim. To answer this question, the Court must identify the mechanics Rule 56 envisioned would permit a party moving for summary judgment to demonstrate a lack of evidence for its adversary's position. Justice Brennan recognized that Celotex's discussion of how a moving party approaches "showing" the district court that there is an absence of evidence created an ambiguity;

> The Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. This lack of clarity is unfortunate: district courts must routinely

> decide summary judgment motions, and the Court's opinion will very likely create confusion.

Celotex, id. at 329, (Brennan, J., dissenting). Justice Brennan, it appears, foresaw the precise quandary that Novatel's Motion presents to the Court. Attempting to cast light on the Supreme Court's interpretation of the mechanics of Rule 56, Justice White stated that 'the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." Celotex, id. at 328, (White, J., concurring). Justice Brennan added:

> The moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish as essential element of the nonmoving party's claim . . . . Where the moving party adopts this option and seeks summary judgment on the ground that the nonmoving party -- who will bear the burden of persuasion at trial -- has no evidence, the mechanics discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a 'burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record.

Celotex, id. at 332, (Brennan, J., dissenting).

At this junction, this Court's task would appear to be clear: it need only determine whether Dowty's support for its Motion for Partial Summary Judgment was a "conclusory" that Novatel had no evidence to support its fraudulent misrepresentation counterclaim, or whether Dowty "affirmatively showed the absence of evidence in the record." However, this apparent lucidity is clouded as Justice Brennan's dissenting opinion continues:

> If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.

Celotex, id. at 332, (Brennan, J., dissenting).

This passage suggests that Justice Brennan anticipated that the nonmoving party would respond to a blanket assertion that it had no evidence to support its claims by demonstrating to the trial court that the record contained evidence rendering the moving party's assertion incorrect. If

Novatel were obligated by Celotex to respond to Dowty's conclusory assertion by demonstrating its patent falsity, the Court's task, rather than focusing on Dowty's submissions, would be to concentrate on Novatel's response.

Assuming first that Celotex requires absolutely no response to a motion for summary judgment supported only with conclusory assertions, the Court finds that Dowty's initial Motion for Partial Summary Judgment, while arguably not 'indentif(ying) those portions of the pleadings, depositions, answers to interrogatories, and admissions on file" which it believed demonstrated an absence of evidence of fraud, it did 'show -- that is, point[ ] out to the court -- that there [was] an absence of evidence to support [Novatel's] case." As noted above, Dowty did refer in its Memorandum to the record established during discovery, stating 'Novatel deposed no less than thirteen Dowty employees and Dowty produced thousands of pages of documents, yet not one piece of Dowty deposition testimony nor one single Dowty document supports Novatel's fraud claim," This sufficiently informed the Court, and put Novatel on notice, that Dowty believed the record was devoid of any direct or circumstantial evidence in support of Novatel's fraudulent misrepresentation counterclaim. 'The summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex, id, at 327, (citing Fed. Rule Civ. Proc. 1; and Schwarzer, 'Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact." 99 F.R.D. 465, 467 (1984)). In this light, the Court notes the inherent difficulty in demonstrating an absence of evidence, and is confident that the most efficient and least expensive method of litigating summary judgment motions predicated on an absence of evidence is to have the nonmoving party that shoulders the ultimate burden of persuasion at trial identify to

the Court and to its adversary those portions of the record that support its claims.

In the instant case, Dowty made it eminently clear that it based its summary judgment on the premise that despite the conclusion of discovery, no evidence had been produced or uncovered which would support Novatel's fraud claim. Novatel made no effort to call the court's attention to evidence in the record that Dowty overlooked. Instead, it chose to oppose Dowty's motion with conclusory assertions about the available evidence. Thus, under the second interpretation of the summary judgment mechanics anticipated by Celotex, Novatel's claim that Dowty did not sustain its production burden is without merit.

Novatel has submitted with its Motion to Reconsider the "Affidavit of Daniel D. Pearlson, President and Chief Executive Officer of Novatel Computer Systems Corporation." Having determined that Dowty's initial Motion for Partial Summary Judgment was sufficient to shift the burden of production to Novatel, the Court is not persuaded that Novatel has offered a legitimate justification for this Court's consideration of supplemental evidence. Novatel had a duty to bring forward any evidence available to it before the Court entered its summary judgment decision, not afterwards. RGI, Inc. v. Unified Industries, Inc., 963 F.2d 658, 662 (4th Cir. 1992); Cartaret Sav. Bank, P.A. v. Compton, Luther & Sons, 889 F.2d 340, 344 (4th Cir. 1990). Rule 56(e) permits the trial court, in its discretion, to receive supplemental material in support or in opposition to a motion for summary judgment before ruling on the motion. 'The underlying purpose of that rule would be undercut if the rule were construed to require the Court to accept further affidavits after it had already ruled on the motion for summary judgment" RGI, Inc., supra at 662. 'Evidence that is available to a party prior to entry of judgment is not a basis

for granting a motion for reconsideration as a matter of law." Boryan v. U.S., 884 F. 2d 767, 771 (4th Cir. 1989).

Novatel's counsel argues that 'Novatel aught (sic) not be prejudiced by the advice of its attorney that (supporting its opposition with factual evidence) was not necessary." While the Court is not unsympathetic to Novatel's plight, the dockets of federal courts would come screeching to a halt if every procedural or tactical misjudgment of lawyers would entitle their clients to a 'second bite at the apple." See, Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573, 576-77 (4th Cir. 1973) (binding client to the consequences of the acts or omissions of his freely selected Attorney); Blinder, Robinson & Co. v. United States SEC, 748 F.2d 1415, 1421 (10th Cir. 1984) ("(K)eeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's attorney upon the defendant."). Therefore, the Court will not permit Novatel to supplement the record.

For the foregoing reasons, Novatel's Motion to Reconsider, or in the alternative, to Permit the Record to Be Supplemented, is denied. It will be appropriately so ordered.

11/9/92
Date

John R. Hargrove
John R. Hargrove
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOWTY COMMUNICATIONS INCORPORATED Plaintiff	*	
v.	*	Civil Action No. HAR 91-3734
NOVATEL COMPUTER SYSTEMS CORPORATION Defendant	*	

ORDER

This sixteenth (16th) day of October, 1992, it is, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Plaintiff Dowty's Motion for Partial Summary Judgment BE, and the same hereby IS, GRANTED.

2 That the Clerk of the Court MAIL copies of this Order and the attached Memorandum Opinion to all parties of record.

/s/ John R. Hargrove
John R. Hargrove
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOWTY COMMUNICATIONS, INCORPORATED	*	
Plaintiff,	*	Civ. No. HAR-91-3734
v.	*	
NOVATEL COMPUTER SYSTEMS CORPORATION	*	
Defendant.	*	

MEMORANDUM OPINION

This is a dispute between two sophisticated corporations involved in the business of selling high-tech communications equipment. Behind the attempt to characterize it as a business tort, the case fundamentally sounds in contract. Pursuant to a Master Distributorship Agreement ("MDA") dated July 1, 1991, the Plaintiff, Dowty Communications Incorporated ("Dowty"), a designer, manufacturer and seller of telecommunications equipment, agreed to supply "Series DPC9506 T-1 network access multiplexers" to the Defendant Novatel Computer Systems Corporation ("Novatel").[1] After receiving the multiplexers from Dowty, Novatel intended to distribute some of the devices to "end-users" under the Novatel logo and name. (Novatel Opp., p. 6-7).

[1]Multiplexers are telecommunication devices which convert digital communications data into an analog format. They are used to send local voice and data messages to and from telecommunications companies.

On December 31, 1991, Dowty initiated the above-captioned action claiming that between July and November 1991, Dowty had supplied Novatel with multiplexers and that despite Dowty's submission of invoices for sales, service and repair, Novatel had failed to tender payment. (Dowty complaint ¶15). In an attempt to collect its receivable, Dowty alleged four causes of action against Novatel: (1) Monies due on account; (2) Breach of contract; (3) Breach of implied covenant of good faith and fair dealing; and (4) Quantum meruit.

In its Answer, Novatel denied that it owed Dowty the sums alleged, and pursuant to Fed.R.Civ.P. 13(a), raised four counterclaims: (1) Fraud; (2) Intentional interference with prospective business advantage; (3) Breach of contract; and (4) Breach of implied covenant of good faith and fair dealing. During the subsequent course of this litigation, Novatel abandoned its second and fourth counterclaim.[2]

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[2]In its Memorandum of Support of Partial Summary Judgment, Dowty persuasively argues that Maryland does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing. The Court was a bit puzzled, in light of Dowty's presentation, that Dowty had not abandoned the same cause of action raised in its Complaint. The Court notes, however, that Dowty has since abandoned its breach of the implied covenant of good faith and fair dealing claim, as well as its claim for quantum meruit.

Presently before the Court is Dowty's Motion for Partial Summary Judgment on Novatel's remaining counterclaims. Summary judgment will be granted when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to Novatel, the party opposing summary judgment. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). With that in mind, the Court has reviewed the memoranda submitted by the parties, no hearing is deemed necessary. Local Rule 105(6). For the reasons stated more fully herein, the Court finds that Dowty is entitled to partial summary judgment.

Novatel's Contract Counterclaim

In Count III of its counterclaim, Novatel alleges that Dowty violated the MDA:

> by failing to ship products to Novatel at the time they were promised; by shipping the products which do [sic] not conform in their design to the products described by Dowty; by shipping products which were defective; by concealing the fact that it knew the products did not conform to the designs described; and by continually promising to remedy the products' defects but failing to do so.

(Novatel counterclaim, ¶ 30). In its prayer for relief on the breach of contract claim, Novatel seeks two million dollars in damages, plus interest, costs, expenses and attorney's fees.

Dowty counters that the explicit terms of the MDA limit both the claims for relief and the remedies available to Novatel. More specifically, Dowty argues that Novatel's breach of contract claims are limited by the "warranty disclaimers" in the contract. In addition, Dowty asserts that the "remedial limitations" of the agreement restrict Novatel's possible recovery to the repair or replacement of the products in question, or to a refund of the purchase price.

1. Warranty Disclaimers

Dowty warranted to Novatel that its products and repair work would be "free from defects in material and workmanship for a period of fifteen (15) months from the date of shipment in the case of Products and ninety (90) days in the case of repair work." (MDA ¶ 10.2). The paragraph discussing warranty goes on to provide, in capital letters:

> THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER TYPE, WHETHER EXPRESS OR IMPLIED.

Dowty argues that this express contractual limitation on warranties restricts Novatel's breach of contract claims to representations made by Dowty within the four corners of the MDA. The Court agrees.

The MDA is a written contract for the sale of telecommunications equipment between two sophisticated merchants. Paragraph 19 of the MDA, "Choice of Law," indicates that the contract is to be "governed by and interpreted, construed and enforced in accordance with the laws of the State of Maryland." As the agreement

contemplates a "transaction in goods, " the Maryland Uniform Commercial Code ("UCC") applies. Maryland Commercial Law Article, § 2-101, et seq.

Section 2-316 of the UCC, "Exclusion or modification of warranties," permits sellers to exclude or modify both express and implied warranties. Express warranties can be negated or limited to those stated in the contract by express language to that effect. UCC § 2-16(1); Boatel Industries v. Hester, 77 Md.App. 284, 300 (1988). Implied warranties can also be disclaimed. UCC § 2-316(2) states that "to exclude or modify the implied warranty of merchantability . . . the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous." All other implied warranties "are excluded . . . by language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." UCC § 2-316(3). Finally, Official Comment 3 to UCC § 2-719 specifically states that "the seller in all cases is free to disclaim warranties in the manner provided in Section 2-316."[3]

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[3]Unlike limitations on remedies, the UCC does not provide for the avoidance of warranty exclusions based on the specific circumstances surrounding an alleged breach. The UCC does instruct the Court to construe a contract which at the same time expresses and disclaims a specific warranty so that the negation or limitation is inoperable, UCC § 2-316(1), but that presumption is not applicable here. UCC § 2-316.1 states that "any language used by a seller of consumer goods which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose is unenforceable". Consumer goods are defined as goods "used or bought for use primarily for personal, family or household purposes." UCC § 9-109(1). Novatel has not argued, nor could it on this record, that the telecommunications products contemplated by the MDA were consumer goods. Thus the restriction on disclaiming warranties expressed in § 2-316.1 is also inapposite.

The clear, unambiguous and conspicuously typed language of MDA paragraph 10.2 complies with the criteria articulated in the UCC for excluding express and implied warranties. In fact, nowhere in its opposition does Novatel argue that the warranty disclaimers of the MDA are inoperative or non-binding. Therefore, the Court finds that Novatel is limited in the pursuit of its breach of contract counterclaim to the representations and warranties expressed in the written agreement. Novatel cannot attempt to show that Dowty's failure to supply products that complied with representations made by Dowty during negotiations constituted a breach of contract. Despite the warranty disclaimers, had Novatel's fraud counterclaim survived summary judgment, evidence concerning representations made during negotiations would have been appropriate. See discussion infra p. 21 - 25.

2. Restrictions on Available Remedies

Dowty argues that in addition to its warranty limitations, the MDA restricts any Novatel recovery to the costs for repair and replacement of defective parts or to a refund of the purchase price. Specifically, Dowty refers to paragraph 11 of the MDA which states:

> [Novatel's] EXCLUSIVE REMEDY, and Dowty's Communication's TOTAL LIABILITY, FOR ANY AND ALL LOSSES AND DAMAGES ARISING OUT OF ANY CAUSE WHATSOEVER (WHETHER SUCH CAUSE BE BASED IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, OTHER TORT OR OTHERWISE) SHALL IN NO EVENT EXCEED THE PURCHASE PRICE OF THE PRODUCTS (OR REPAIR PRICE OF THE WORK) IN RESPECT TO WHICH SUCH CAUSE ARISES. IN NO EVENT SHALL

> Dowty Communications BE LIABLE FOR INCIDENTAL,CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES RESULTING FROM ANY SUCH CAUSE INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS.

Dowty asserts that paragraph 11 precludes Novatel from seeking damages for loss of business, damages for injury to reputation and goodwill, as well as punitive and exemplary damages.

The UCC contemplates that parties to a contract will agree to restrict their available remedies should the contract ultimately be broken. Section 2-719, "Contractual modification or limitation of remedy," states

> an agreement . . . may limit or alter the measure of damages recoverable, as by limiting the buyer's remedies to the return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts . . . [so long as] circumstances [do not] cause an exclusive remedy to fail of its essential purpose.

UCC § 2-719(1)(a) and (2). In addition, "consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." UCC § 2-719(3).

The contractual language of MDA paragraph 11 creates a two-tiered limitation on Dowty's potential liability. On the first level, Dowty's exposure is limited to the cost of repairing or replacing nonconforming multiplexers, or in the alternative, to the refunding of the purchase price. If that limitation were deemed to be not effective, the second level operates to preclude Novatel from recovering incidental, consequential, special and punitive damages, as well as lost

profits. Under the UCC, these two levels of restrictions must be analyzed separately.

Novatel's ability to recover damages from Dowty in excess of the cost to repair or replace the defective multiplexers, or in excess of the purchase price, depends on its ability to persuade the Court that the MDA's restricted remedies, under the circumstances, "fail of their essential purpose." UCC 2-719(2). Should Novatel succeed in undermining the limited "repair, replace or refund" remedy, its opportunity to collect consequential damages would depend on its persuading the Court that the MDA restriction on consequential damages is "unconscionable," or that Dowty's alleged breach was "total and fundamental," or that Dowty acted in "bad faith."

A. The Limited Remedy Did Not Fail of its Essential Purpose.

Novatel's most substantial attempt to circumvent the MDA's remedial limitations springs from its claim that under the circumstances, the "repair, replace or refund: remedy "fails of its essential purpose." This approach urges the Court to refuse to enforce the restriction on the contractual remedies because to do so would deprive Novatel of the "benefit of its bargain." The first Official Comment to UCC § 2-719 states:

> Under this section, parties are left free to shape their remedies to their particular requirements and reasonable agreement limiting or modifying remedies are to be given effect. However, it is of the very essence of a sales contract that there are at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Title they must accept the legal consequence that there be at

> least a fair quantum of remedy for breach of the obligations or duties outlined in the contract .... Under subsection (2), where an apparently fair and reasonable clause because of the circumstances fails in its essential purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Title.

There are at least two ways of determining whether a particular set of facts deems a restrict contractual remedy to fail of its essential purpose. The first is to assess the potential breaches envisioned by the parties when they agreed to limit their remedies and then to compare the actual breach to the parties' initial expectations. If the expectations and reality are materially the same, the remedial limitation should be enforced. See Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990) ("A limited repair remedy serves two main purposes. First, it serves to shield the seller from liability during her attempt to make the goods conform. Second, it ensures that the buyer will receive goods conforming to the contract specifications within a reasonable period of time." Citing, Chatlos Systems v. National Cash Register Corp., 635 F.2d 1081, 1085 (3rd Cir. 1980)). The second, more common approach is to evaluate the compliance of the party in breach with its limited remedial responsibilities. If the party violating the agreement fails to compensate the innocent party in the limited manner provided for by the contract, the remedy has failed of its essential purpose. Under either of these approaches, Novatel has not shown that it is entitled to the more expansive damages it seeks.

An excellent example of the first approach is demonstrated in Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102 (4th Cir. 1980). "A pragmatic approach in applying section 2-719(2) to a specific warranty involves an

initial determination of the essential purposes intended by the seller and buyer in proposing and accepting the limited warranty." Id. at 1107, citing Eddy, "On the 'Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)," 65 Calif.L.Rev. 28, 30 - 40 (1977). Because neither party has submitted evidence nor addressed in argument their respective intentions in agreeing to paragraph 11, the Court attempts to "glean the essential purpose of the limited warranty from the transaction." Coastal Modular, supra, F.2d at 1107.

Focusing on the context in which Dowty and Novatel consummated the MDA is helpful in the Court's attempt to infer what type of breach Dowty and Novatel anticipated when drafting paragraph 11. It is reasonable to infer that both parties understood that Dowty would supply a product that was to bear Novatel's logo and name, and that Novatel intended to distribute to its clientele. Moreover, both parties realized that the multiplexers supplied by Dowty, by there nature, were not the type of product which could be readily identified as "defective." Given these prior understandings, it is reasonable to attribute to the parties the following anticipations in the event that the multiplexers were defective: (1) defects would not become apparent until Novatel's customers has the multiplexers installed and had tried to operate them; (2) remedying multiplexer defects would require cooperation between Novatel and Dowty whereby Novatel informed Dowty of problems and either Dowty traveled to the location of Novatel's customers or Novatel's customers sent defective multiplexers back to Novatel or Dowty; and (3) defects would cause Novatel's customers to be dissatisfied with Novatel as the multiplexers were to have Novatel's, and not Dowty's logo and name on them. In limiting Dowty's liability to the costs of repairing or replacing the multiplexers, the parties intended that Novatel would inform Dowty of defects, allow Dowty a reaonsable time to make repairs or replacements, and implicitly, forego any

consequential damages for loss of business, reputation or good will while such repairs were being made.

The facts involved in Coastal Modular are closely analogous to the facts presented here. There, a manufacturer of panels for air traffic control towers agreed to supply such panels to the general contractor, (Coastal), which in turn was to assemble the towers for the United States Navy. When the Navy informed Coastal that the panels were defective and that they needed to be removed and replaced, and after the manufacturer refused to replace the panels, Coastal sued seeking damages for the costs of investigating the cause of the defects, removing the Navy installed electrical elements from within the panels and replacing the panels. In defending against the suit, the manufacturer raised a contractual limitation on remedy which provided that the manufacturer would only refinish or repair panels, or pay for the cost of replacing each defective panel.[4]

In rejecting the manufacturer's contractual defense, the Fourth Circuit found that "coastal and [the manufacturer] each intended to receive something from their bargain. The limited warranty allowed [the manufacturer] to limit prospective damages. Coastal expected that defective panels would be replaced by virtue of the contract's terms, thus avoiding the inconveniences of delay during construction." Coastal Modular, id. The Court went on to state that

> supplying new panels after latently defective panels were installed would only return Coastal to a portion of its expense, [as Coastal] would be obliged to assume the extra expenses of

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[4]The Fourth Circuit specifically noted that in Coastal Modular, in contrast to this case, the warranty contained no specific exclusion of consequential damages nor a disclaimer of implied warranties. See infra note 6.

> removing the defective panels and installing the new ones . . . . It is difficult to believe that a buyer in an equal bargaining position would accede to accepting such liability for a defect caused by the seller.

Coastal Modular, id. Thus, after concluding that the function of the limited warranty was to provide replacement panels in time for their inclusion in the towers, the Court of Appeals compared that purpose to the facts surrounding the breach. Because the defective nature of the panels became evident only after Coastal had built them into the Navy towers, the limited remedy could not satisfy the purpose for which it was originally intended.

In contract to the facts in Coastal Modular, the alleged breach by Dowty is exactly the type of breach, and has generated exactly the type of damages, that the parties reasonably anticipated when negotiating and signing the MDA. Consequently, under the first approach to determining whether a restricted remedy fails of its essential purpose, the Court concludes that the MDA limitations are effective and binding.

The more common approach adopted by Courts in their analysis of a restricted remedy's ability to fulfill its "essential purpose" is the examination of the violating party's compliance with the already limited contractual remedy. For example, in RRX Industries, Inc. v. Lab-Con, Inc., 772 F.2d 543 (9th Cir. 1985), the buyer of a computer software system brought a breach of contract action against the seller based on defects in the system. In determining that the "repair or replace" remedy failed of its essential purpose, the Ninth Circuit held "since the defendant was either unwilling or unable to provide a system that worked as represented, or to fix the 'bugs' in the software, these limited remedies failed of their essential purpose." RRX Industries, Inc., id at 547. See

also, Consolidated Data Terminals v. Applied Digital Data Systems, 708 F.2d 385, 392 (9th Cir. 1985) (In action brought by distributor of computer terminals against manufacturer, "where warranted goods fail to perform according to specifications as warranted despite the seller's efforts to repair, a limited 'repair' remedy fails of its essential purpose."); Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 707 (9th Cir. 1990) ("A contractual provision limiting the remedy to repair or replacement of defective parts fails of its essential purpose within the meaning of 2-719(2) if the breaching manufacturer or seller is unable to make the repairs within a reasonable time period."); Chatlos Systems v. National Cash Register Corp., 635 F.2d 1081, 1085 (3rd Cir. 1980) (In action of buyer of a computer system against the seller for breach of express and implied warranty, "the limited, exclusive remedy fails of its purpose and is thus avoided under 2-719(2) whenever the warrantor fails to correct the defect within a reasonable period. Because NCR never furnished four of the six promised functions, their attempted limitation of remedy failed of its essential purpose. CSI was therefore deprived of the substantial value of its bargain.").

Novatel has argued that it "gave Dowty every opportunity to 'repair or replace' its defective products with ones that worked. Dowty simply would not remedy the situation even though it had the ability." (Opp. Mem. p. 15). However, Novatel has not supported its assertion with facts. Consequently, there is no evidence in the record which suggests that Dowty refused to repair defective multiplexers. Ironically, the only evidence in the record relating to the repair of defective multiplexers was submitted by Dowty.[5]

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[5]Bradley Collingwood, the Executive Vice President of Novatel and head of its technical operations testified in a deposition that although Dowty made a specific request to Novatel to return certain units which Novatel claimed to be defective, Colllingwood, on direct orders from Novatel's president, refused to allow such repairs to be made.

This Court cannot, in the absence of factual support, conclude that Dowty refused or failed to comply with its promise to repair or replace the defective multiplexers simply because Novatel argues in its memorandum that is what occurred. The primary function of the summary judgment procedure is "to determine whether there is an issue of fact to be tried, and if there is none, to cause the judgment to be rendered accordingly." Porter v. General Boiler Casing, Co., 284 Md. 402, 413, 369 A.2d 1090 (1979). Summary judgment is appropriate to dispose of factually unsupported claims. Felty v. Graves-Humphrey Co., 818 F.2d 1126, 1128 (4th Cir. 1987). Pursuant to Fed.R.Civ.P. 56(c) summary judgment is proper,

> [I]f the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

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Footnote 5 continued from previous page -

Q. Do you know whether those five units were ever sent back to Dowty?

A. I know they were not.

Q. Did you have any discussions with anybody concerning sending those multiplexers back to Dowty?

A. I believe I had a discussion with Mr. Pearlson, yes.

Q. Could you tell me about that discussion, please?

A. The discussion was don't send the units back.

Q. Why did he tell you not to send the units back?

A. Because we had to install them at customer sites?

Q. Even though you knew they had problems?

A. I knew that certain units had problems, yes. They were not all --

Q. But Mr. Pearlson wanted to put them into (sic) the field; is that correct?

A. We had to, yes.

(Collingwood Dep. at 206-209, Exhibit 2 to Goss Supp. Aff.).

> moving party is entitled to judgment as a matter of law.

Anderson, supra 477 U.S. at 247. As explained by the Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986),

> Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322. Rule 56(3) addresses in clear and unambiguous terms, the precise nature of the evidentiary burden borne by a party opposing summary judgment:

> An adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

It is well established, at least in the Fourth Circuit, that a party wishing to oppose summary judgment must present evidence tending to raise a material and genuine factual dispute. Novatel's failure to present evidence that Dowty refused to honor its "repair, replace or refund" remedy, mandates, under the second approach, that summary judgment be entered against it. See Bradford v. School District No. 20, Charleston, South Carolina, 364 F.2d 185

(4th Cir. 1966); Foy v. Norfolk and Western Railway Co., 377 F.2d 243 (4th Cir. 1967); Morrisey v. William Morrow and Co., Inc., 739 F.2d 962 (4th Cir. 1984); Sturdivant v. Medical Engineering Corporation, 121 F.R.D. 51 (D.Md. 1988).

Although the Court, having determined that the limited "replace, repair or refund" remedy prescribed by the MDA has not ailed of its essential purpose, need not reach Novatel's arguments concerning the availability of consequential damages, for the sake of completeness, the Court briefly addresses Novatel's remaining arguments. The Court notes again that the distinction between types of contractual limitations on remedies must be maintained. As stated above, Dowty's liability was limited in two separate respects: first, by the "repair, replace or refund" remedy and second, by a restriction on consequential damages. Courts have recognized the distinction, and have upheld a limitation on consequential damages even after determining that the "repair, replace or refund" remedy failed of its essential purpose. For example, in S.M. Wilson & Co. v. Smith Int'l Inc., 587 F.2d 1363, 1375 (9th Cir. 1978), the Ninth Circuit held that "the failure of a repair remedy does not require permitting the recovery of consequential damages." The Court of Appeals reasoned that where parties agree to a limitation of damages provision, courts should not alter the bargained-for risk allocation unless a breach of contract is so fundamental that it causes a loss which is not part of that allocation.[6]

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[6]See also, Coastal Modular, supra at 1107.
"Coastal and Laminators could have specifically agreed to limit consequential damages, but they did not. Had Laminators' warranty specifically limited consequential damages, Coastal could have only received its costs of the material even though that represented partial failure of the essential purpose of the warranty. It seems unlikely that a buyer would agree to such a limitation in the circumstances in this case, but a conscious acceptance of such an agreement would bind him even

B. The Restricted Remedies Are Not Unconscionable.

The transaction between Novatel and Dowty was commercial in nature, involving sophisticated business entities. As such, the terms of the MDA are presumptively valid. Flow Industries, Inc. v. Fields Const. Co., 683 F.Supp. 527, 531 (D.Md. 1988). Both parties, dealing at arm's length, consented to the terms of paragraph 11. It was a "commercially sensible arrangement" for Dowty to limit its exposure and to protect itself from the potentially huge consequential damages that Novatel may incur, (or at last claim that it incurred), from distributing the Dowty supplied multiplexers under its own logo and name. "the agreement is not one 'such that no man in his senses and under delusion would make on the one hand, and no honest and fair man would accept on the other.'" Schrier v. Beltway Alarm Company, 73 Md.App. 281, 294 (1987), citing Earl of Chesterfield v. Janssen, 28 Eng.Rpr. 82 (1750).

In dismissing Novatel's "unconscionability" assertion, the Court need not rely solely on its inferences of the reasonable motivations and expectations of Novatel and Dowty. In his deposition, Daniel Pearlson, President of Novatel, testified that he "thought that the agreement was pretty well clear," and that he felt he understood it. (Pearlson Dep. p. 136). Moreover, Novatel itself incorporated provisions limiting available remedies in its agreements with its own customers. In a letter dated January 11, 1991, Pearlson wrote to one of Novatel's customers that he felt "that it [was] reasonable for [the customer] to accept that [Novatel's] liability should not exceed the cost of equipment

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Footnote 6 continued from previous page -
in the face of a partial failure of the essential purpose of the remedy unless the limitations were unconscionable."

that [Novatel had] agreed to maintain." (Exh. 5 to Goss Affidavit). Given that the President of Novatel understood the restrictions on available remedies and attested to such limitations' reasonableness, this Court is not prepared to find the MDA restrictions on consequential damages "unconscionable."

C. The Record Does Not Indicate that the Alleged Breach was Total or Fundamental."

Another approach some courts have taken in approaching the effectiveness of a contractual limitation on consequential damages is to focus on the magnitude of the breach so as to assess whether the limited warranty should be enforced. In S.M. Wilson & Co. v. Smith International, Inc., supra, the Ninth Circuit found that the seller of a tunnel boring machine (which did not perform as efficiently as promised) was not liable for consequential damages because the default was "not so total and fundamental as to require that its consequential damage limitation be expunged from the contract." S.M. Wilson & Co., id at 1175. In contrast, RRX Industries, Inc. v. Lab-Con, Inc., supra, held that the seller of a computer software system violated its contract by failing to install an operational system, repair software malfunctions or train the buyer's employees. Because the Ninth Circuit deemed this breach "total and fundamental," and because it found that the circumstances rendered the damages limitations "oppressive and invalid," the court relieved the buyer from the contract's remedial limitations.[7]

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[7]The facts alleged by Novatel, were they to be supported with admissible evidence, are more closely analogous to those involved in S.M. Wilson & Co. than those in RRX Industries, Inc. In S.M. Wilson & Co., the plaintiff was able to dig its tunnel, albeit not as quickly as the defendant had promised. On the other hand, in RRX Industries, Inc., the plaintiff received nothing -- no operating systems, no repairs and no employee training. Here, Novatel received multiplexers, some of which did not

There is no evidence in the record that supports Novatel's allegation that Dowty's breach was "total and fundamental." To be sure, Novatel argues that Dowty's breach was 'total and fundamental.' The product didn't work." (sic) (Opp. Mem. p. 11. Similarly, Novatel claims that

> [it] did not receive what it had bargained for. [It}was told by Dowty that the 9500 series multiplexers were the functional equivalent of the 9400 . . . . Such was not the case. The 9500 series multiplexers, even on the rare occasions when they were operable, could never perform the functions of the 9400 series.

(Opp. Mem. p. 14). But Novatel has failed to submit admissible evidence t ending to support its assertions. While commendably attempting not to "overburden" its opposition with "appendages," as discussed above, Novatel was required by the clear mandates of Fed.R.Civ.P. 56(e) to support its allegations with factual evidence. Its attachment of "DCP 9500 Systems Failure Analysis" without any authentication, explanation of when or how it was compiled, or description of its significance does not satisfy the evidentiary requirements of Rule 56.

D. Novatel Has Not Demonstrated Dowty's Bad Faith

American Electric Power Co. v. Westinghouse Electric Corp., 418 F.Supp. 435 (S.D.N.Y. 1976) and Long Island Lighting Co. v. Transamerica Deloval, Inc., 646 F.Supp. 1442 (S.D.N.Y. 1986) hold that a defendant may not

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Footnote 7 continued from previous page -
operate all the time. The fact that they operated some of the time prevents Dowty's breach from being "total and fundamental."

rely upon the provisions of a contract, including one disclaiming liability for consequential damages, where the defendant acted fraudulently or in bad faith. Novatel argues that "by making Novatel an unwilling and unwitting Beta test site, Dowty was guilty of the egregious bad faith. This in and of itself should preclude Dowty from asserting any limitation of damage provisions."[8] (Opp. Mem. p. 15). In support of this claim, Novatel references, without attaching, the deposition testimony of Henry Houck, and of Steve Feldstein, Vice President of Dowty in charge of sales. Without being able to read the transcript, this Court is not prepared to hold that Dowty acted in bad faith simply because Novatel asserts that Dowty intended on using Novatel as a beta test site.[9]

Novatel's Fraud Counterclaim

In paragraph 9 through 19 of its counterclaim, Novatel alleges that Dowty fraudulently induced it to purchase a DCP9506 multiplexer product by representing that the product all the same functions and features as the more expensive multiplexer that Dowty had initially marketed to Novatel (a DCP9400 system). Moreover, Novatel asserts that Dowty represented that the DCP9506 and the DCP9400 used compatible components and hardware. According to Novatel's claims, Dowty represented that the product was functional and that Dowty was beginning beta testing.

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[8]Beta testing refers to product testing at a customer location, attempting tasks the product was designed to perform. Alpha testing, by contrast, is done by a manufacturer, in its laboratory, using test equipment.

[9]In the first place, even under the assumption that Dowty so intended, the multiplexers would already have been alpha tested in the lab. Novatel has no support for the assertion that a manufacturer acts in bad faith when it uses a customer as a beta test site. Nor has Novatel factually supported its assertion that it did not know the product had not been beta tested before it was shipped by Dowty.

Novatel asserts that Dowty knew its representations were false, and that it continued to make such false representations so as to secure Novatel's order. Finally, Novatel alleges that it would not have entered the distribution agreement had Dowty been honest about the functional capacity of the DCP9506 multiplexer.

While in light of the MDA's limitation on warranties it is understandable why Novatel filed its counterclaim alleging the tort of fraud, the Court notes at the outset that

> a good argument can be made for keeping intact the line between contract and fraud for misrepresentations about product quality, at least in commercial transactions involving sophisticated merchants . . . . Where representations relating to product quality are involved, as between sophisticated buyers and sellers, the law of contract, which, unlike the law of tort, eschews ideas of moral blameworthiness and punitive recoveries, ought to furnish the exclusive remedy.

Blue Circle Atlantic, Inc. v. Falcon Materials, Inc., 760 F. Supp. 516, 519 (D.Md. 1991). "where the controversy concerns purely economic losses allegedly caused by statements made during the course of a contractual relationship between businessmen, it is plainly contract law which should provide the rules and principles by which the case is to be governed." Flow Industries, Inc. v. Fields Construction Co., 683 F.Supp 527, 530 (D.Md. 1988) citing Wood Products, Inc. v. CMI Corp., 651 F.Supp. 641, 648 (D.Md. 1986).

In Maryland, fraud must be proven by clear and convincing evidence. Everett v. Baltimore Gas & Electric Co., 307 Md. 286, 513 A.2d 882 (1986). To prove fraud,

Novatel must demonstrate (1) that Dowty made a false representation; (2) that Dowty knew the representation was false or made it with such reckless indifference as to its truth or falsity that knowledge may be imputed to it; (3) that Dowty's representation was made for the purpose of defrauding Novatel; (4) that Novatel relied on the misrepresentation; had the right to rely upon it with full belief in its truth; and would not have done the act resulting in damage if Dowty had not made the representation; and (5) that Novatel suffered damage as a direct result of the misrepresentation. Aeropesca Ltd. v. Butler Aviation Int'l., Inc., 44 Md.App. 610, 619-620, 411 A.2d 1055 (1980).

While Novatel's counterclaim states the five constituent elements of a fraud claim, Novatel failed to submit, in accordance with Fed.R.Civ.P. 56, factual support for each element. "There can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, supra, 477 U.S. at 322-323.

Aside from Novatel's failure to attach affidavits or deposition testimony to its opposition memorandum, the few allegations it makes within the body of its argument, even were the Court to excuse the fact that the evidence referred to was not attached to the memorandum, do not satisfy each element of fraud.[10] For instance, Novatel has neither

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[10]On page 16 of its opposition, Novatel asserts "Novatel was clearly damaged (ruined) by its rightful reliance on Dowty's representations and there has been no suggestion that Novatel's reliance was unreasonable. Dowty not only had reason to believe that Novatel was relying on its representations but actively promoted its product to Novatel. There is clear evidence that Dowty knew or should have know that the 9500 series product was not ready for deployment. The specific misrepresentations were that the product was the functional equivalent of the 9400 series and that it had been fully Beta tested and certified."

produced nor alluded to any factual support for its allegations concerning the representations supposedly made by Dowty. While it would not have been difficult for Novatel to attach an affidavit or deposition of its President outlining his version of the contractual negotiations, this Court, in the absence of such minimal showing, will not attempt to infer what representations, if an were actually made. The Court has read the many cases cited by Novatel which state that summary judgment is seldom appropriate when particular states of mind are decisive elements of the claim. But Novatel cannot avoid summary judgment simply by pleading fraud, and especially in a case like the one at bar, where there is an absence of factual support on a nonsubjective or state of mind element, summary judgment is appropriate. Bradford, supra.

Conclusion

The Court notes its discomfort in closing the door on many of Novatel's claims for recovery based on its inability to comply with the procedural requirements of Rule 56. Novatel claims on page 3 of its opposition memorandum that the record in this case "consists of over 100,000 documents and 17 depositions in 27 volumes of testimony." The Court is left to wonder why, with that magnitude of material available, Novatel failed to present enough evidence to demonstrate at least a factual dispute over the key elements of its claims. One hypothesis may be that such evidence simply doesn't exist. Whatever the reason may be, the mandatory language of Rule 56(e) dictates that the Court grant Dowty's motion.

For the foregoing reasons, Dowty is entitled to partial summary judgment with respect to Novatel's counterclaims. The breach of contract counterclaim is appropriately limited to the warranties and promises made within the four corners of the MDA; if Novatel prevails on its contract counterclaim, its damages will be limited to the cost of repairing or

replacing the multiplexers, or to a refund of the purchase price. Moreover, Novatel's fraud claim is not supported by sufficient evidence to create a factual dispute, and therefore, it will be appropriately dismissed.

It will be so ordered.

10/16/92

/s/ John R. Hargrove
John R. Hargrove
United States District Judge

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A. Novatel's Fraud Claims Fail Because A Trier Of Fact Could Not Reasonably Conclude, By Clear And Convincing Evidence, That Dowty Made Representations Which It Knew To Be Untrue At The Time It Entered Into The Agreement And That Any Such Representations Caused Damage To Novatel.

1. Maryland Law Requires Fraud To Be Shown By Clear And Convincing Evidence.

Under Maryland law, fraud must be shown by clear and convincing evidence. Blue Circle, 760 F.Supp. at 519 (citing Everett v. Baltimore Gas & Electric Co., 307 Md. 286, 513 A.2d 882 (1986); Peurfoy v. Congressional Motors, Inc., 254 Md. 501, 517, 255 A.2d 332, 340 (1969). To demonstrate fraud, a claimant must establish the following elements:

1) that the defendant made a false representation;
2) that the defendant knew the representation was false, or made it with such reckless indifference as to its truth or falsity that knowledge may be imputed to it;
3) that the defendant made the representation for the purpose of defrauding the plaintiff;
4) that the plaintiff relied on the misrepresentation, had the right to rely upon it with full belief in its truth, and would not have done the act resulting in damage if the defendant had not made the representation; and
5) that plaintiff suffered damage directly resulting from the misrepresentation.

reasonably conclude that Dowty made representations about the quality or characteristics of its products which it knew to be false at the time such representations were made. Pursuant to this court's opinion in Shepard, and the Supreme Court's opinion in Celotex, Novatel must come forward with specific evidence that shows that at the time any of the alleged representations were made, Dowty did not intend to produce equipment conforming to those representations. Shepard, 743 F. Supp. at 430, Celotex, 477 U.S. at 377. Indeed, Novatel deposed no less than thirteen Dowty employees and Dowty produced thousands of pages of documents, yet not one piece of Dowty deposition testimony nor one single Dowty document supports Novatel's fraud claim.

In Blue Circle, Judge Smalkin also granted summary judgment on the fraud claims which were based on the seller's post-contract representations because the buyer failed to prove that their rightful reliance on the alleged misrepresentations directly caused them actual harm. Blue Circle, 760 F. Supp. at 520.

Judge Smalkin's closing comment in granting summary judgment on defendant's post-contract fraud claim in Blue Circle squarely applies to the issue presented in the case at bar:

> Here, although defendant might well have been damaged by the poor quality of the cement, that damage stemmed from defects in the product itself, not from representations as to its quality. Thus, defendants' counterclaim for fraud, Count II of the amended counterclaim, will be the subject of a grant of summary judgment for the plaintiff.

Blue Circle, 760 F. Supp. at 520 (emphasis added).[9]

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[9] Earlier in his opinion, Judge Smalkin similarly noted that " . . . whatever loss might have been suffered by defendants was on account of

Blue Circle involved facts nearly identical to those involved in the present case. As set forth above, a cement seller brought a collection action for cement sold and delivered, and the buyer counterclaimed alleging, among other things, that the seller's fraudulent misrepresentations with respect to the quality of the cement it was to produce had induced the buyer to enter into a contract with the seller. The buyer also alleged that it continued to purchase the cement despite its quality problems in reliance on similar representations made by the seller during its course of performance.

Judge Smalkin granted summary judgment on the fraud claims involving both the pre- and post-contract representations. The court granted summary judgment on that part of the fraud claim which was based on the Seller's pre-contract representations because the Buyer offered no specific evidence by which a trier of fact could reasonably conclude, by clear and convincing evidence, that at the time the seller made the representations, it did not intend to produce cement of a quality satisfying those representations. Blue Circle, 760 F. Supp. at 519.

Like the buyer in Blue Circle, Novatel cannot offer specific evidence on which a fact finder could

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circumstances a cause of action based on a fraudulent representation of a future intention . . . In order to establish such a claim, a plaintiff must show by clear and convincing evidence that the defendant made the alleged promissory misrepresentation without a present intent to perform it . . . As evidence of defendant's fraudulent intent in this particular case, plaintiff has done no more than point to evidence indicating that the purported promise was never kept. Under Maryland law, this sort of showing is clearly insufficient.

1989 WL 206582 at 10 (citations omitted).

Millman, 1989 WD 205582 at 9; Aeropesca, 44 Md. App. at 619-620, 411 A.2d at 1061.[7]

2. Novatel Has No Evidence On Which The Trier Of Fact Could Conclude, By Clear And Convincing Evidence, That Dowty Committed Fraud.

Novatel can offer no evidence that before entering into the Agreement, Dowty made any representations which it knew to be false at the time that such alleged representations were made. Also, Novatel cannot show that any reliance upon such alleged representations by Dowty caused damage to Novatel. Therefore, there is no material issue of fact as to two of the elements required for Novatel's fraud claims and Dowty is entitled as a matter of law to summary judgment on Count One of Novatel's Counterclaim.

Summary judgment should be granted where a buyer fails to offer specific evidence that a seller knowingly made false representations as to the future characteristics or quality of the goods it is to produce pursuant to a contract. Blue Circle, 760 F. Supp. at 519. See also Millman, 1989 WL 206582 at 10-11 (granting summary judgment where plaintiff failed to show that defendant made the allegedly fraudulent representation of its future intention without a present intent to perform).[8]

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[7] Judge Smalkin held that it was unclear whether each fraud element must be proved by clear and convincing evidence. Blue Circle, at 520. But see Millman, 1989 WL 206582 at 10-11 (applying clear and convincing standard to the fraud elements). However, as set forth in this Memorandum, Novatel's fraud claim fails even when viewed under a preponderance of the evidence standard.

[8] In Millman, the District Court of Maryland stated:

> The alleged misrepresentation is insufficient because it relates solely to future intentions of defendant, and there has been no showing of an intent to defraud . . . Maryland law recognizes under very limited

As in Blue Circle, even assuming that Novatel experienced problems with Dowty products, Novatel's problems "stemmed from defects in the product itself, not from representations as to its quality" Id. Accordingly, and for the foregoing reasons, Novatel's attempt to recast its contract claim as a fraud claim must fail, and summary judgment is therefore appropriate with respect to Count One of the counterclaim.[10]

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the poor quality of the cement and is compensable, if at all, under the U.C.C. . . ." Blue Circle at 520.

[10] Although summary judgment on Novatel's fraud claim would make it unnecessary for this Court to address the issue of punitive damages, it should be noted that Novatel has no evidence of malice and that Dowty would be entitled to summary judgment on this issue as well. In light of current Maryland case law, it is unclear if a claimant must show actual or legal malice to recover punitive damages in an action for fraudulent misrepresentation. Owens-Illinios v. Zenobia, 325 Md. 420, 460 n. 21, 601 A. 2d 649.

Novatel can offer no evidence that Dowty's conduct was of such a "heinous nature" as to justify an award of punitive damages. Id., 325 Md at 454, 601 A. 2d 649. Therefore, there are no issues of material fact that Dowty did not make any of the alleged representations with either legal or actual malice, and Dowty would also be entitled to summary judgment as a matter of law on the issue of punitive damages.

Rule 56. Summary Judgment

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and n good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse

party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.